

COMMENT

Comments on Rulemaking vs. Democracy: Judging and Nudging Public Participation That Counts

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The U.S. Environmental Protection Agency (EPA or the Agency) receives millions of public comments each year on actions ranging from nationwide rules to facility-specific petitions. This level of engagement and interest reflects the fact that the Agency's mission, to protect human health and the environment, touches all Americans. There is no doubt that informed comments from individuals with situational knowledge as well as fair-minded comments from legally and technically sophisticated stakeholders are incredibly valuable to the Agency, and also to the individuals and entities ultimately affected by the EPA's actions. We receive many of these types of comments and they help to inform analyses, identify the best options, and, most importantly, allow the Agency to make better decisions. We also receive many comments through mass comment campaigns that express a preference for a particular approach or outcome. These are usually electronic submissions with largely repetitive text, but submitted by many different individuals.

In answer to the question "What kind of participation should we value?" our response would be: "All of it." While nudging public participation that provides substantive feedback is certainly a worthwhile effort, agencies should also continue to facilitate the "cheap and easy" participation that Farina et al. characterize as to-be-resisted and of little value. We do not have to choose: public participation is not a zero-sum game.

I. Not a Zero-Sum Game

Mass mailer type comment submissions do not serve the same purpose as unique, substantive comment submissions, but they do have value in the rulemaking process. And agencies can and do accept and consider all types of comments. While large numbers of comments sometimes come with logistical challenges—we have heard stories of government offices being crippled for days during rulemaking efforts in the 1990s because fax machines were occupied unendingly with reams of identical comments—this

should not be seen as a basis for discouraging them. And, the logistical challenges may soon be a thing of the past; current technologies available to agency users of Regulations.gov have gone a long way toward solving them.

Agencies can accept, sort, and compile comments so that they may all be considered. For example, identical comments can be grouped and counted with little investment of staff time. Certainly this has gotten easier since the days of the fax machine and will continue to get easier as information and communication technologies (ICT) continue to develop and evolve symbiotically with the many ways the public participates in government decision making. So, we would like to begin by putting aside the notion that accepting mass comments somehow detracts from more substantive comments, and focus on what the mass comments themselves have to offer.

II. Value of Mass Comments

The "bread and circuses" description offered by Farina et al. rests at least in part on the false premise that the average submitter of a mass comment is laboring—or perhaps *not* laboring, but rather taking a few moments to sign or click and then moving on with their day—under the impression that they are being granted a "vote" in an outcome. While we agree that a regulatory outcome should not be determined by majority vote, we disagree with this premise.

Rather, we expect the motives of individual commenters are likely to be numerous and widely varied, and we will touch on three purposes that comments received in connection with mass comment campaigns can serve: (1) adding weight to the more informed and detailed comments provided by the group facilitating the comment campaign, (2) revealing the level of public awareness of a given issue, and (3) providing a voice where there might otherwise be silence.

Finally, we recognize that the public participation process itself has intrinsic value, both to the government decision makers, and to those participating in the process.

A. Adding Weight

The first function is analogous to the “agree” or “support” type options that Farina et al. describe as being useful in the Web 2.0 context. Providing this sort of “proxy” vote where an individual has confidence in the analysis and policy positions of a given nongovernmental organization (NGO) is an entirely legitimate way for individuals to participate in the public process when they do not have the time, ability, or inclination to tackle the analysis themselves. From our perspective, these individuals are giving the NGO that provided the link and stock language their “agree!” And that tells us more than how that particular NGO is faring in fundraising; it tells us how persuasive or important the commenters find its articulated positions on the given issue to be. To be clear, it doesn’t make the underlying analysis more likely to be accurate, but it tells us something about how widely it is valued. While not useful in the same way information about the feasibility of retrofitting with a particular pollution control technology may be, it is nonetheless a valid type of information, and one agencies should continue to facilitate.

For the most part this sort of “adding weight” amounts to what Farina et al. describe as a group-framed preference. And frequently, these preferences are in large part value preferences. While we agree with Farina et al. that rule-making is not an electoral process, and that these expressed preferences should not determine final rules, they do have a rightful role in the process. In fact, the Administrative Procedure Act requires that agencies accept “views” as part of the opportunity for interested persons to participate: “After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments” 5 U.S.C. §553(c) (2012).

EPA’s work may be particularly susceptible to being the basis for group-framed value preferences because the Agency’s mission is about improving the environment and public health: outcomes that directly affect the entire public, despite the fact that the expertise about the details of *how* such outcomes are best reached may reside with a select few. While determining the details of a given standard or method may be divorced in some measure from the content or objective of mass comment campaigns, we must, and can easily, accept these views.

B. Revealing Awareness

In addition to the deliberate aligning of their views with a given policy position or value preference, mass commenters tell us something about the *level* of awareness on an issue. The number of comments, irrespective of the content, gives us a sense of how many people care and how widely dispersed that interest is. For some actions, where the Agency

has worked hard to engage the public and to raise awareness, a large number of public comments can be an indication of successful outward engagement. For others, where perhaps the Agency had thought there to be a narrower set of stakeholders or interested parties, a large number of public comments can be a wake-up call.

From mass comments, we have at least some indication of how a specific issue has penetrated into public discourse. For example, the Agency received three million comments in support of reducing carbon pollution, hundreds of thousands in support of limiting mercury and other toxics from power plant emissions, and tens of thousands in support of reducing nutrient pollution in Florida’s waters. To the extent mass comments provide a sense of the geographical or demographic distribution of commenters, this too can be of value, if not in formulating an agency action, perhaps in formulating an agency’s approach to informing and educating the public and stakeholders about the action.

C. Providing a Voice

Third, knowledge is indeed widely dispersed, and on any given issue, interest may be widely dispersed as well. While we routinely hear from the more sophisticated stakeholders—the multinational companies, the industry groups, larger NGOs, and the lawyers who represent them—we may hear less frequently from the communities where the facilities reside, the very places where individuals may be most directly affected.

Farina et al. do include this value in their preferred “who.” They attribute situational knowledge, and thereby valuable comments, to individuals who have “traditionally been under-voiced” in the process. Farina et al. describe anecdotes provided as comments that have the ability to highlight complexities, identify contributory causes, and reframe regulatory issues. These comments can do all of that, and are incredibly valuable for those reasons. But even a simple expression of value preference, provided by comment with little else, especially from those communities who may have previously been less engaged, is valuable.

D. Engaging the Public

Perhaps most importantly, we believe there is inherent value in public participation: the value of an engaged citizenry. Congress itself called for this in the National Environmental Policy Act, recognizing that “each person should enjoy a healthful environment and that *each person has a responsibility to contribute to the preservation and enhancement of the environment.*” 42 U.S.C. §4331(c) (emphasis added). Broad-based, mass commenting campaigns provide one opportunity to realize that goal.

There is an educational element associated with each comment, because the individual who takes the time to

learn a little about an issue still knows a little more than they did before they made that effort, and because they learn a bit about how participation itself works.

There is value to the participating person in being afforded the opportunity to comment. While hitting send on a prepackaged comment may not ultimately change the outcome of the regulatory process, it may be for that individual the beginning of a self-identity as a person who cares about the actions and activities of his or her government and a person who values the opportunity to voice his or her opinion. It is the regulatory equivalent of the sticker that says "I voted." It may be the gateway to a more substantive role in an issue, for example, a letter to the local zoning commission or remarks at a public listening session. An individual with such experiences may indeed go on to become the commenter who takes the time to read the materials on Regulations.gov, or to provide much needed situational knowledge when a rule comes along that he or she recognizes as benefitting from some dispersed piece of information or experience they happen to have.

Finally, there is value to the public servants who are made aware that a larger segment of the public cares about the work they are doing.

III. Conclusion

In a long-term view of the development of processes for public decision making, the development of ICT has been relatively recent and extraordinarily rapid. In the space of approximately two decades, the tools and techniques that the average American uses to interface with the government have been fundamentally transformed. As these tools and the way people use them evolve, we will no doubt have days where the "fax machines" are down. But when we begin drawing lines and making judgments about "the kind" of participation the government should value, we begin to walk down a dangerous path. In our democratic system, the sitting government is *not* the arbiter of what public participation counts. And while we see the wisdom in targeting resources where we expect to gain the most relevant input, the assigning of value on the front end of the public participation process is not a path we would recommend. The value of a commenter's views should not be prejudged, and the price of participation should not be a J.D., a Ph.D., or hours of preparatory reading. Fundamentally, people should be encouraged to tell their government what they think.